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No. 82-708

IN THE

Supreme Court of the United States

October Term, 1983

SUMMA CORPORATION,

Petitioner,

v.

STATE OF CALIFORNIA ex rel. STATE LANDS COMMISSION and CITY OF LOS ANGELES,

Respondents.

On Writ of Certiorari to the Supreme Court of California

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

This case concerns California's claim under the Equal Footing Doctrine to a tidelands "public trust" property interest in Mexican grant lands.[1] The rancho grant involved was confirmed by the United States and an unqualified federal patent was issued pursuant to the Treaty of Guadalupe Hidalgo (9 Stat. 922 [1848]) and the Act of March 3, 1851. (9 Stat. 631 [1851].) The questions presented are:

1. May the State now assert a "public trust" property interest in the confirmed Mexican rancho grant, even though the federal patent was issued without qualification or reservation?

[1] The present owner of the land, petitioner Summa Corporation, is part of a privately held interconnected network of corporations. (*See* Pet. Br. iii.n.1.)

2. May the State collaterally attack the General Land Office's 1873 factual determination that the rancho land involved was not tidelands?

Viewed in the perspective of these questions, the welter of arguments advanced by respondents is wide of the mark and unconvincing.[2]

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[2] As a threshold matter, respondents ask the Court to reconsider its grant of certiorari, claiming that this Court lacks jurisdiction because the case involves only the "incidents" of title which, respondents say, is a traditional state law question. (Cal. Br. 1, 23-28; L.A. Br. 22-27.) The court below never characterized the case as involving the "incidents" of title, but instead recognized that the case turns on whether California received any interest in Mexican grant lands upon its admission to the Union. This is a classic federal question, as this Court recently emphasized: "Federal law governs the scope of title initially vested by the equal-footing doctrine. . . ." *California, ex rel. State Lands Commission v. United States*, 457 U.S. 273, 286n.14 (1982). *See also State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-371, 375, 376-377 (1977).

I. THE 1851 ACT PATENT IS CONTROLLING AND PRECLUDES THE SILENT RESERVATION OF A "PUBLIC TRUST" PROPERTY INTEREST FOR CALIFORNIA.

A. The Patent Issued To Petitioner's Predecessors Does Not Reserve A "Public Trust" Interest.

The State places primary emphasis on the claim that petitioner's title is subject to an "express reservation" which assertedly includes the State's "public trust" property interest.[3] (Cal. Br. 8-15.) This argument is based upon the provision in the 1839 Mexican grant to the effect that the rancho may be enclosed "without prejudice to the traversing roads and servitudes (servidumbres)." The argument is flawed in two respects.

First, the "traversing roads and servitudes" provision has never been held to preserve so extensive and permanent a property interest as the State's asserted tidelands "public trust."[4] *United States v. Coronado Beach Co.*, 255

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[3] Regardless of the outcome of the "public trust" issue in this case, the environmental and ecological concerns of the State are protected by the regulatory framework of the California Coastal Act. Cal. Pub. Res. Code §§ 30000-30900. Pursuant to that Act, the California Coastal Commission must approve any proposed land use plan within the coastal zone and measure it against the environmental and other policies of the Act. *Id.*, §§ 30200-30264. On January 12, 1984, the Coastal Commission, acting on the advice of the California Department of Fish & Game, approved a land use plan for the Marina del Rey/Ballona area. Los Angeles Times, January 13, 1984, Part II, p.1. The land use plan includes a commitment by petitioner to set aside 209 acres of its land, all within the former "inner bay," as a wetlands nature preserve and wildlife habitat management area and to spend approximately $10,000,000 to restore and maintain this area for a period of 50 years.

[4] In a brief filed in 1982 in the case of *Amigos de Bolsa Chica v. Signal Properties*, 190 Cal. Rptr. 790 (App. 1983) (discussed *infra* at pp. 11-13), the State asserted that the Mexican grant for Rancho La Bolsa Chica was not subject to the "public trust" interest despite the presence of the boilerplate provision concerning traversing roads and servitudes. The precise language in the Bolsa Chica grant is as follows: "He may enclose it without prejudice to the crossroads and servitudes. . . ." *Transcript of the Proceedings in Case No. 405, Joaquin Ruiz, Claimant, vs. The United States, Defendant, for the place Named La Bolsa Chica.* 205 SD, page 14.

U.S. 472, 485-486 (1921), held that the provision did not diminish a grant of tidelands.[5] In *Barker v. Harvey*, 181 U.S. 481 (1901), the same language was held not to preserve the Indians' right of occupancy when they failed to present their claim in the 1851 Act proceedings. The Court said:

> "It [the provision] does not mean that the general occupation and control of the property is limited by any so-called servidumbres, but only that such full control shall not be taken as allowing any interference with established roads or cross roads, or other things of like nature." 181 U.S. at 499.

Measured by the *Barker* Court's interpretation, the language of the Mexican grant for Rancho La Ballona could not preserve a "public trust" property interest, because such an interest would clearly limit the "general occupation and control" of the property. Indeed, as pointed out in petitioner's opening brief, the "public trust" interest is an expansive and permanent property interest which extinguishes fundamental aspects of private ownership. What the "public trust" interest would permit the State to do — "to enter upon and possess" petitioner's land, to construct improvements on it, to afford public access and even to "preserve" the land in its natural state as open space without payment of compensation — clearly contravenes *Barker* by limiting petitioner's occupation and control of the land. (*See* Pet. Br. 10-12.)

The State, however, now seeks to downplay the "public trust" property interest, saying that it is "not true that Summa can do nothing with its property." (Cal. Br. 5.)

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[5] In attempting to discount *Coronado*, the State points to an argument made by the United States in that case. (Cal. Br. 10n.12.) What the State neglects to mention is that the Court declined to adopt the United States' argument that the compensation owed for its condemnation of Coronado Island should be reduced on the theory that, even if privately owned, the tidelands were burdened with a "public trust" easement. (Brief of the United States, *The United States of America v. Coronado Beach Co.*, No. 524, October Term 1920, pp. 46-54.) Instead, this Court held that the 1851 Act patent gave unqualified title to the tidelands. 255 U.S. at 487-488.

The State asserts that petitioner "has the right to make any use of the land it sees fit in the absence of the State's exercise of the retained public trust easement." (Cal. Br. 4.) This "right" is illusory. First, the State has already purported to exercise its "public trust" interest in petitioner's land.[6] Second, even if the State had not, the permissible private uses of property subject to the State's "public trust" interest are drastically restricted. A knowledgeable California state legal official has written:

> ". . . [T]he governmental trustee, not the private party, is vested with the trust use which is superior to the fee title. . . .
>
> ". . . [N]o private use of undeveloped tidelands can be made by the private patentee of such lands with any assurance that it will not be inconsistent with the remaining public trust easement." Taylor, *Patented Tidelands: A Naked Fee?* 47 CAL. ST. B.J. 420, 486 (1972) (footnotes omitted).[7]

A property interest as permanent and pervasive as that carved out by the California Supreme Court was clearly never intended to be reserved by the provision that the rancho grant could be enclosed "without prejudice to the traversing roads and servitudes." Rather, the provision was intended only to preserve a right of passage over "established roads or cross roads, or other things of like nature." *Barker v. Harvey*, 181 U.S. 481, 499 (1901).

Second, though glossed over in the State's brief, it is highly significant that the "traversing roads and servi-

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[6] "[T]he [California] Coastal Act [Cal. Pub. Res. Code §§ 30000-30900], insofar as it affects public trust lands, is an act exercising the public trust existing over such lands, as well as a regulatory act according to the policies in Chapter 3 of the Act." Staff of the California Coastal Commission, *Report re County of Los Angeles Local Coastal Program, Marina del Rey/Ballona Land Use Plan (LUP)*, October 7, 1983, p. xiv.

[7] The author of this article, which is cited by the State (Cal. Br. 4), is the same N. Gregory Taylor, Esq., Assistant Attorney General, who appears on the State's brief here. The article contains the standard disclaimer that "[t]he views expressed . . . are those of the writer and do not necessarily reflect the views or policies of the Department." 47 CAL. ST. B.J. at 421.

tudes" provision was not included in the controlling patent issued to petitioner's predecessors in 1873 as a result of the 1851 Act proceedings. The federal patent is unqualified and without reservation. (J.A. 101-109.)

Nevertheless, the State implies that the "express reservation" of the "traversing roads and servitudes" provision was carried forward in the 1854 decree of confirmation of the Board of Land Commissioners (Cal. Br. 9n.10), but that suggestion does not withstand scrutiny. The decree does not incorporate the so-called "express reservation" or any language to that effect. (J.A. 21.) The decree's only reference to the original Mexican grant is to provide "further description" of the physical boundaries. (*Id.*) The 1855 confirmatory order of the United States District Court also refers to the original grant only for "a more particular description" of the physical boundaries, and again there is no reference to the so-called "express reservation." (J.A. 22-23.)

Under the 1851 Act, the Board of Land Commissioners was required to decide all issues concerning the validity and legal operation of the grant under Mexican law. (§§ 8, 11; P.A. A109-A110, A111.) *See also United States v. Fossatt*, 62 U.S. (21 How.) 445, 448-449 (1859). The Board's nonincorporation of the "traversing roads and servitudes" language represents a decision well within its competence and authority, and is not subject to reconsideration now. *More v. Steinbach*, 127 U.S. 70, 84 (1888). Since there was full compliance with the statutory scheme, and since jurisdiction under the Act of 1851 was to decide all questions and conflicting claims "rightly or wrongly," *Thompson v. Los Angeles Farming Co.*, 180 U.S. 72, 77 (1901), the absence of the so-called "express reservation" from the decree and patent is conclusive.[8] *Beard v. Federy*, 70 U.S. (3 Wall.) 478, 491-492 (1865).

[8] *New Orleans v. United States*, 35 U.S. (10 Pet.) 622 (1836), is not analogous to the present case. In *New Orleans*, the federal government's attempt to exercise "local sovereignty" over municipal land in New Orleans was rejected, not because a "public trust" title interest in the land survived the Louisiana land confirmation process, but because the federal government is constitutionally precluded from exercising local governmental power. 35 U.S. (10 Pet.) at 735-736. *See also Van*

B. California's Belated Assertion Of A "Public Trust" Interest Is Barred.

Petitioner's opening brief demonstrated that the State's failure to present its claimed "public trust" property interest in the 1851 Act proceedings prevents its belated assertion now (Pet. Br. 24-27) and that, when it issued an unqualified patent, the United States did not secretly reserve any rights in petitioner's land. (Pet. Br. 27-31.) The State's response is to reject the applicability of the Act of 1851 and such cases as *Barker v. Harvey*, 181 U.S. 481 (1901), *United States v. Title Insurance Co.*, 265 U.S. 472 (1924), *Pumpelly v. Green Bay Co.*, 80 U.S. (13 Wall.) 166 (1871), *Leo Sheep Co. v. United States*, 440 U.S. 668 (1979), and *United States v. Rindge*, 208 F. 611 (S.D. Cal. 1913), on the ground that they dealt only with property rights. (Cal. Br. 10n.12, 18n.18, 21n.20.) The suggestion seems to be that the tidelands "public trust" is not a property interest, but a "sovereign right" which the Equal Footing Doctrine passed to the State unaffected by the 1851 Act proceedings.

In so arguing, the State confuses the reason it claims to have obtained a "public trust" property interest with the nature of what it assertedly obtained. While the Equal Footing Doctrine is rooted in sovereignty and the

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Brocklin v. Tennessee, 117 U.S. 151, 167-168 (1886); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 223 (1845) ("the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted"). There is nothing in *New Orleans* to suggest that if the land involved had been confirmed and patented to a private party without reservation, as Rancho La Ballona was, the City would have been held to have any interest in it.

Nor is *Eldridge v. Trezevant*, 160 U.S. 452 (1896), in point. *Eldridge* dealt with Louisiana's limited servitude for the construction of levees over lands on the shores of rivers subject to overflow; it did not involve a permanent property interest, like California's "public trust," which is held to exist regardless of the land's present condition. The levee servitude was upheld, not because of its French and Spanish precursors, but because it was expressly created by the Louisiana Civil Code in a valid exercise of state police power. 160 U.S. at 462-464, 468-469.

state prerogatives it confers are held "in trust" for the public, *Illinois Central Railroad v. Illinois*, 146 U.S. 387, 453 (1892), it has long been recognized that the Equal Footing Doctrine has "a direct effect on certain property rights," namely "ownership" of tidelands. *United States v. Texas*, 339 U.S. 707, 716-717 (1950). By virtue of its sovereignty, California received "absolute property" in tidelands, but only those which had not been the subject of prior grants by Mexico. *Weber v. Board of Harbor Commissioners*, 85 U.S. (18 Wall.) 57, 65-66 (1873); *Knight v. United States Land Association*, 142 U.S. 161 (1891); *State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375 (1977). The fact that the State is now claiming an interest less than the full fee does not make it any less a property interest. Indeed, in the end even the State admits that "the [asserted] public trust easement over tide and submerged lands is a reserved public title interest." (Cal. Br. 39.)

The State's attempt to distinguish the cases cited by petitioner because they involve property rights collapses when it is remembered that the "public trust," as enunciated and enlarged by the California Supreme Court, is a broad property interest which leaves the private owner with only "naked title to the soil." *See People v. California Fish Co.*, 166 Cal. 576, 589-599, 138 P. 79, 84-88 (1913). Under California law, this "public trust" interest exists independent of the police power and does not depend upon the present condition of the land, but upon its historical character as tidelands when California was admitted to the Union.[9] *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 399, 60 P.2d 825, 829 (1936). The "public trust" may be asserted by any interested citizen

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[9] By emphasizing the current condition of the property (Cal Br. 1-3; L.A. Br. 1-3), respondents may be seeking to create the impression that the decision below is an application of the State's navigational power rather than a holding that the State owns a permanent property interest in petitioner's land. However, the Court below chose to uphold the State's claim to petitioner's property on the basis of a "public trust" interest, and it is on that basis that it must be judged. *See Michigan v. Long*, 103 S.Ct. 3469, 3476 (1983); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 739 (1950).

— even against an attempt by the State to relinquish it. *Marks v. Whitney*, 6 Cal. 3d 251, 261-262, 98 Cal. Rptr. 790, 797-798, 491 P.2d 374, 381-382 (1971).

The nature and magnitude of the asserted "public trust" interest brought it squarely within the ambit of the 1851 Act. The Act, in order to achieve its purpose of giving security of land titles, required all persons "claiming lands in California by virtue of any right or title derived from the Spanish or Mexican government" to present their claims to the Board of Land Commissioners within two years. (§§ 8, 13; P.A. A109-A110, A111-A112; Pet. Br. 18-24.) Because the "public trust" interest is a pervasive and perpetual easement which virtually destroys the value of the private property, a statute with the avowed purpose of stabilizing property rights could not fail to embrace so extensive a property interest.

That property interest, if it ever existed, derived from the United States under the Equal Footing Doctrine. The 1851 Act patent to petitioner's predecessors is conclusive upon those — like California — who claim property rights from the United States in conflict with a confirmed Mexican grant.[10] *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938).

The State also asserts that it should not be barred from making its belated claim of a "public trust" interest on the additional ground that the State could not — or

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[10] *Townsend v. Greeley*, 72 U.S. (5 Wall.) 325, 337 (1866), is not authority that the 1851 Act proceedings lack conclusive effect simply because the State claims to be acting as "trustee" of the public in asserting rights in former Mexican grant lands. In *Townsend* the Court said that the confirmation of a pueblo grant need not expressly recite the beneficial interest of the inhabitants of the city. This ruling reflects the statutory provision that the confirmation proceeding shall not affect the rights of third parties. (§ 15; P.A. A113.) *See also More v. Steinbach*, 127 U.S. 70, 83 (1888). Unlike *Townsend*, there is no issue here as to the capacity — trustee or beneficial owner — in which petitioner's predecessors held their title, and the State, as successor to the United States, is not a third party to the confirmation proceeding. *United States v. O'Donnell*, 303 U.S. 501, 512-513 (1938). The issue here is whether the State — in any capacity — owns an interest in petitioner's land.

"in practice" did not — participate in 1851 Act proceedings. (Cal. Br. 16n.17.) The argument proves too much. If correct, California would be equally free to claim fee title, instead of a "public trust" interest, to any tidelands within a Mexican grant on the ground that the State's right to such "sovereign" lands was not precluded by the 1851 Act proceedings. The claim to fee title is clearly foreclosed, *e.g.*, *San Francisco v. LeRoy*, 138 U.S. 656, 671 (1891), and the claim to a "public trust" interest is indistinguishable in this respect.

Moreover, the State's contention of non-participation in 1851 Act proceedings is wrong both legally and factually. As early as 1864, nine years before the patent for Rancho La Ballona was issued, California had the express statutory right, when "claiming to have an interest in the tract embraced by [a] survey, or in any part thereof," to file with the Surveyor General for California objections to the published survey of any rancho.[11] 13 Stat. 332 (1864).

Indeed, the State at least occasionally availed itself of this statutory right. It participated in the 1851 Act proceedings with respect to Rancho Sausal Redondo, the rancho immediately south of La Ballona in the Los Angeles basin. (The National Archives, RG 49, California Private Land Claims, Docket 414.) Following the confirmation of the grant for Rancho Sausal Redondo, a controversy arose as to the survey of the grant. The State of California appeared in the 1851 Act proceedings to claim that certain land included in the final survey belonged to the State by virtue of a grant of public lands by Congress. 5 Stat. 453, 455 (1841). In this connection, the State in 1871 filed a printed brief entitled "Appeal from the Commissioner of General Land Office in Sausal Redondo and

[11] From 1860 to 1864, the State, when claiming a "right or title derived from the United States," had the right through its own counsel to "aid" the United States District Attorney in representing its interest, although the State could not intervene directly. 12 Stat. 33, 34 (1860). Prior to 1860, rights of the State derived from the United States were protected in 1851 Act proceedings by a law agent, appointed by the President, "whose special duty it shall be to superintend the interests of the United States." (§ 4; P.A. A108.)

Other Cases Involving the Surveys of the Rancho Tajauta; Aguage del Centinela; Cienega O'Paso de la Tijera, and Sausal Redondo; All in Los Angeles County, California."

This example demonstrates that the State could — and did, when it thought its interests threatened — participate in Mexican grant confirmation proceedings. That it did not do so in the [redacted] of Rancho La Ballona is a reflection, not of the State's inability to protect itself, but of the contemporary view that the State had no property interest in Mexican rancho lands.

C. The State's Attempt To Impose A Tidelands "Public Trust" On Mexican Rancho Lands Is A Recent Invention.

The State's brief attempts to create the impression that it has long been recognized that the State holds a "public trust" interest in Mexican rancho lands. For example, the State argues that the "state high court did not impress an interest on lands that previously had not been so encumbered; rather, it merely recognized what had always been the case...." (Cal. Br. 4.) Again, the State says that the "public trust has always existed over Ballona Lagoon." (Cal. Br. 5.)

On the contrary, the decision below unsettles titles to Mexican rancho lands thought to have been decided more than a century ago. Prior to the present case, the California courts had never suggested that the State owned any interest in tidelands or wetlands which were patented to private Mexican grantees and had never been owned by the State in fee. The court below explicitly recognized that fact. (P.A. A10.) As recently as two years ago, so did the State.

In a brief filed in January 1982 in the case of *Amigos de Bolsa Chica v. Signal Properties,* 190 Cal. Rptr. 790 (App. 1983), the State expounded the common understanding that no "public trust" interest existed in con-

firmed Mexican rancho lands. Respondents' Brief, *Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc.*, California Court of Appeal, 4 Civ. Nos. 23146 and 23778.[12]

The *Bolsa Chica* case involved a 1973 boundary and land exchange agreement made pursuant to a state law (Cal. Pub. Res. Code § 6307) providing for the settlement of title and "public trust" claims between the State and private owners. 190 Cal. Rptr. at 802. While the Bolsa Chica property is largely separated from the ocean by Pacific Coast Highway and most of it is cut off from tidal action by a dam built in 1899, historically it was subject to the ebb and flow of the tides and some of the area may have been submerged lands. *Id.* Title to most of the land was derived from the Mexican grant of Rancho La Bolsa Chica confirmed and patented under the Act of 1851; the balance came from state tidelands patents.

The State, seeking to uphold the settlement, described the origins of land titles in California and the special status of Mexican grant lands. (Pp. 3a-7a, *infra*.) The brief emphasized that under the Equal Footing Doctrine, California received sovereign ownership only of "ungranted" tidelands, i.e., those not previously granted by Mexico. (P. 7a, *infra*.) The State pointed out that Mexican rancho lands are not subject to the "public trust"

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[12] The relevant pages of this State brief are reproduced as an appendix. *Infra*, pp. 1a-14a. The California Supreme Court granted hearing in the *Bolsa Chica* case on August 18, 1983, but has not yet rendered its decision. The opinion of the Court of Appeal cited above was superceded by the grant of hearing and not published in the official reports. *See* Cal. Rules of Court, Rule 976(d) (1972).

The State's brief in the *Bolsa Chica* case was filed while the present case was under submission in the state supreme court. In a letter subsequently submitted to the Court of Appeal in the *Bolsa Chica* case, the State claimed that page 28 of its original brief (pp. 10a-11a, *infra*) "erroneously states that the Rancho lands were not subject to the public trust," and that "this statement in the brief was made in error." Letter to the Court, *Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc.*, California Court of Appeal, 4 Civ. Nos. 23146 and 23778, October 20, 1982, p. 3n.2. (This letter is reproduced in the Appendix. *Infra*, pp. 15a-23a.) No explanation was offered as to how the "error" occurred. Nor did the State disavow the statements on other pages of the original brief to the same effect.

and thus were not freed from the "public trust" by the Bolsa Chica agreement:

> "... [T]he State did not terminate the public trust within all 1,700 acres, as claimed. The State first determined in the Agreement that 1,444.52 acres of the Bolsa Chica area were rancho lands *not* subject to the State's tide and submerged land claims....
>
> "Within the area declared free of the public trust were 1,251.95 acres of rancho lands as to which such a declaration was only confirmatory, as no public trust existed over rancho lands." (P. 10a, *infra;* emphasis in original.)

The brief contains further statements to the same effect: "the 1,251.95 acres of rancho lands ... were already independent of the public trust" (p. 12a, *infra*); "rancho lands ... were not subject to the trust." (P. 12a note 39, *infra.*)

The State's unequivocal assertion in its own appellate court just two years ago that "no public trust existed over rancho lands" reflects the understanding prevailing for more than a century prior to the California Supreme Court decision. That understanding should not be changed now to allow imposition of a far-reaching "public trust" property interest on land unqualifiedly patented by the federal government under the Act of 1851.[13]

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[13] Illustrating the potential reach of the decision below in this area is a contemporary map of the Ballona Lagoon area on which the State Lands Commission's line designating "where the public trust may exist" is superimposed. (Pet. Br. App.) The State protests that the map is not a State Lands Commission map, though it acknowledges that such maps are used by the California Coastal Commission. (Cal. Br. 3n.5.) It is not clear why the State seeks to shift responsibility for the preparation of this "public trust" line to the Coastal Commission, a companion State agency, but the effort is unconvincing. An April 14, 1983 letter written by the Executive Director of the State Lands Commission admits that "Staff of the State Lands Commission has supplied to the Coastal Commission maps showing the approximate extent of potential public trust lands." Staff of the California Coastal Commission, *Report re County of Los Angeles Local Coastal Program, Marina del Rey/ Ballona Land Use Plan (LUP)*, October 7, 1983, Exhibit F-16.

II. THE LAND OFFICE'S DETERMINATION THAT THE LAND WAS NOT TIDELANDS IS CONCLUSIVE.

In its opening brief, petitioner demonstrated that the General Land Office had made a determination in the 1851 Act proceeding that the property in question was not an arm of the sea and thus not tidelands, and that this finding is conclusive. (Pet. Br. 31-37.) Respondents' principal response is to cite historical evidence challenging the factual basis for the finding.[14] This is an impermissible collateral attack. *Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901). Indeed, the basic purpose for the rule of conclusiveness is to insure that "such questions cannot thereafter be relitigated in the courts," as respondents are attempting to do. *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

In seeking to adduce evidence contrary to the Land Office's finding, respondents place great emphasis on the "inlet" designated on the initial Hancock survey. (Cal. Br. 2n.2, 29, 31, 35, 36; L.A. Br. 2, 34.) Despite the State's insistence that the Hancock map was never "amended" or "changed" (Cal. Br. 32, 34, 35), the map was in fact amended to delete the reference to the "inlet."

[14] It was admitted at trial that the waters of Ballona Lagoon are not navigable under any federal test. (C.T. 986.) While the trial court found that at high tide the lagoon is navigable by "rowboats, canoes, surfboards and other shallow-draft craft" (P.A. A52), this limited navigability may be the result of dredging. For example, the text accompanying the 1908 photograph appended to the State's brief (App. 3) describes some of the dredging that had taken place in the nineteenth century in an effort to create a "Port Ballona":

> "In the spring of 1886 the Ballona Harbor & Improvement Company was organized. . . . It was proposed to excavate a channel 200 feet long by 300 feet wide which would let the tide into the lagoon where Ballona Creek entered the sea. This would create an inner harbor two miles long and from 300 feet to 600 feet wide with depth varying from six to twenty feet. It was declared that this harbor would float the fleets of the world. . . .
>
> "A large amount of dredging was done and a great deal of money — nearly $300,000 — was spent during the three years in which work was carried on (more or less spasmodically) upon the proposed harbor." W. MYERS & I. SWETT, TROLLEYS TO THE SURF 49 (1976).

This emendation can be seen by comparing the 1858 plat (J.A. 26) with the plat finally approved by Willis Drummond, Commissioner of the General Land Office, on December 8, 1873, which was introduced into evidence at the trial below (D. Ex. B; R.T. 292, 997) and is appended to the State's brief. (Cal. Br. App. 1.) Conspicuously absent from this final plat is the designation "inlet" which appeared on the initial Hancock survey. The deletion of the word "inlet" makes the final plat completely consistent with the December 18, 1872 report of Surveyor General Hardenbergh,[15] which referred to this area as the "outlet" of Ballona Creek to the ocean (J.A. 111), and with Commissioner Drummond's determination that it is the place "where it empties into the ocean." (J.A. 93.)

Having been deleted from the final plat, the earlier designation "inlet" could hardly create an ambiguity justifying a collateral attack on the express determination that the "inner bay" was not an arm of the sea and thus not tidelands. The California Supreme Court's reexamination of the 1850 character of the land to retroactively award the State a major property interest violates the fundamental principle of conclusiveness of patent determinations. *Gardner v. Bonestell*, 180 U.S. 362, 369-370 (1901); *Johnson v. Drew*, 171 U.S. 93, 99 (1898).

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[15] The State accuses both petitioner and the Solicitor General of "desperate advocacy" for pointing out (Pet. Br. 33n.37; U.S. Br. 21n.22) that the year of this letter should be 1872 instead of 1873, asserting "[t]here is nothing to suggest that the letter's date is anything other than that appearing on the face of the letter." (Cal. Br. 33n.30.) On the contrary, there is an abundance of evidence to show that the letter's true date is December 18, 1872. Hardenbergh personally certified the patent for Rancho La Ballona on November 23, 1873, and the patent was issued by President Grant on December 8, 1873. (J.A. 108-109.) There would have been no reason for Hardenbergh to write the report on December 18, 1873, after the final decision of the General Land Office and after the patent was issued. Moreover, in the original archives the handwritten notation "(2)?" appears above the "3" in the year, and the translation of the Mexican record which the report transmitted (J.A. 110) was certified by Hardenbergh on December 17, 1872. (D. Ex. A.)

CONCLUSION

For all of the foregoing reasons, as well as those set forth in petitioner's opening brief, the judgment of the Supreme Court of California should be reversed and the case remanded for further proceedings consistent with the decision of this Court.

Respectfully submitted,

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February, 1984

APPENDIX

4 Civil Nos. 23146 and 23778

IN THE

Court of Appeal of the State of California

FOURTH APPELLATE DISTRICT

Division Two

AMIGOS DE BOLSA CHICA, INC., et al.,
Plaintiffs and Appellants,

vs.

SIGNAL PROPERTIES, INC., et al.,
Defendants and Respondents.

RESPONDENTS' BRIEF

Appeal from the Judgment of the Superior Court of the State of California, in the County of Orange Honorable Oretta F. Sears, Judge

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INTRODUCTION

In 1973 the State and Signal entered into an agreement settling public trust rights in Bolsa Chica. Six years later, the Amigos de Bolsa Chica, Inc. ("ABC") filed this lawsuit. The trial court ruled that ABC had waited too long and that the action was barred by Public Resources Code section 6341.

The State submits that the statute of limitations is dispositive of this action. However, due to the unique quality of public trust lands and the allegations of appellants, it is necessary to examine the factual background and applicable case law. For this reason, the brief will begin with a discussion of the nature of the public trust.

[*2] ***STATEMENT OF FACTS**

A. History of Bolsa Chica Leading to Dispute Between Signal and the State.

By this action, commenced in 1979, Amigos de Bolsa Chica, Inc. and the individual plaintiffs (hereinafter referred to collectively as "ABC"), seek to invalidate a compromise agreement settling disputed claims between the State of California[1] and the private defendants (hereinafter referred to collectively as "Signal" or the "Signal Companies"). The agreement is entitled "Boundary Settlement and Exchange Agreement Regarding Lands in the Bolsa Chica Area, Orange County, California," and was executed in March 1973 (hereinafter "Agreement" or "1973 Agreement") following more than two years of study, evaluation, and appraisal, including extensive public discussion and participation. This statement of facts will set forth the history and terms of the Agreement in order to make it clear that ABC's six year delay in commencing this suit renders it untimely, and that, in any event, the Agreement is valid.

The Bolsa Chica property[2] is located in Orange County, and is separated from the ocean by Pacific Coast Highway Route 1. (Exh. 11, p. 2.)[3] "Bolsa Chica," which means the "little purse" (little bay), is now a misnomer; no separate bay entrance presently exists. Tidal action occurs only through a highway culvert and affects a small portion northerly of a dam cutting off the majority of the area from such action. (Exh. 1, p. 258.)

Prior to the 1973 Agreement, Signal claimed fee title to the entire parcel comprised of over 1,970 acres. The

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[1] ABC's complaint named the State of California, the State Lands Commission, the Attorney General, and the Department of Fish and Game. These entities will be referred to hereinafter as the "State."

[2] The Bolsa Chica property involved in this suit is a 1,970 acre fraction of the original 8,000 + acres covered by the Rancho La Bolsa Chica and associated tideland patents.

[3] The trial court took judicial notice of the State's exhibits 1-49 and the Petition for Writ of Mandate, certain pleadings and exhibits in *City of Long Beach v. Mansell*, California Supreme Court, L.A. No. 29700 [3 Cal. 3d 462 (1970)]. This court is asked to do likewise. (Evid. Code § 459(a).) Appendix "A" hereto is a color reproduction of the Exhibit 12 map.

State, on the other hand, asserted fee title to a portion of the property, i.e. the historic submerged lands, and further asserted a public trust easement for commerce, navigation and fisheries over an area of patented tidelands. After extensive study, the State concluded that its submerged lands claims totaled 63 acres of fee title and its tideland easement claims affected 463.4 acres for a total of 526.4 acres. (Exh. 1, p. 023.) The boundaries of the area affected by the State claims were uncertain. Thus, property rights in the area were in dispute, and title was clouded. It was this dispute that was resolved by the 1973 Agreement. (Exh. 1, pp. 019-020.)

1. Origins of Land Title in California.

In order to set this case in proper context, it is necessary to set out not only its factual background but also an abbreviated history of land titles in California.

[*3] *Land in California derives from three basic sources:

(1) Mexican grants, mostly ranchos and pueblo lands, titles to which were derived from Spain and Mexico prior to California's becoming a state, and later confirmed by the United States.

(2) United States public domain lands, embracing all lands passed to the United States on Mexico's cession of California, excluding state lands and Mexican grants.

(3) State lands, embracing lands granted by Congress to California out of the public domain, and tide and submerged lands which the State received by virtue of its sovereignty upon admission to the Union.[4]

This case involves land encompassing categories (1) and (3) above: Mexican grant lands (ranchos), and state tide and submerged lands. Despite ABC's allegations that the 1973 Agreement purported to convey to Signal 1,700 acres of tidelands (I CT 82, 88, 89, 99; II CT 1C, 1F, 1O, 1R, 1S, and 1T), official documents duly noticed by the trial court show that of the 1,970.02 acres of the Bolsa

[4] II Ogden's Revised California Real Property Law (1st ed. 1975) p. 1237.

Chica area here considered, 1,444.52 acres were rancho lands. (Exh. 14, p. 16.) We will first examine how the rancho lands have been treated.

a. *Federal Confirmation of the Rancho La Bolsa Chica.*

There are two rancho grants involved in this case. One is the grant of the La Bolsa Chica Rancho. The other is the Las Bolsas Rancho grant.[5] The Rancho La Bolsa Chica was conveyed by grant of Mexico to Joaquin Ruiz on July 31, 1841.

The Treaty of Guadalupe Hidalgo was signed in 1848 (9 Stat. 922), following the war with Mexico. Article 8 of the Treaty provided:

> "In the said territory, property of every kind, now belonging to Mexicans now established there, shall be inviolably respected. The present owners, the heirs of these, and all Mexicans who may hereafter acquire said property by contract, shall enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

Following the acquisition of lands from Mexico, Congress created a procedure for establishing title to those lands in private parties, towns, etc., by enacting the Act of March 3, 1851 (9 Stat. 631). This Act authorized the President of the United States to establish a Board of Land Commissioners with judicial powers. The Board was to review all claims arising under the treaty, consider
[*4] evidence presented both *on behalf of the claimant and the United States, decide the validity of the claim and certify its decision to the United States District Attorney. (*Id.*, at section 11.)

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[5] The Las Bolsas Rancho grant concerns only a minor area along the southeasterly boundary of the Bolsa Chica area. These coastal sand hills and minor blufftop areas, i.e., high ground, are not amenable to ABC's arguments. [See p. 284 of Exh. 1 (Exh. 2 of Resources Agency Conceptual Plan) and Exhs. 4 and 7.] In any event, the confirmation procedures described for the Rancho La Bolsa Chica apply equally to Rancho Las Bolsas. (See Exh. 7, 8 and 9.)

In reviewing the validity of the claims, the Board was to:

> "... be governed by the treaty of Guadalupe Hidalgo, the law of nations, the laws, usages, and customs of the government from which the claim is derived, the principles of equity, and the decisions of the Supreme Court of the United States, so far as they are equitable." (*Id.*, at section 13.)

Upon confirmation of a claim by the Board, a certificate of confirmation and a plat or survey of the lands, approved by the U.S. Surveyor General of California, was to be issued to the claimant, who would present them to the general land office and be issued a United States patent.

The Act of March 3, 1851 was subsequently amended by the Act of June 14, 1860 (12 Stat. 33). This amending act provided for publication of the U. S. Surveyor General's approval of a survey and plat, and authorized the district court in its discretion to reexamine a survey upon request of any interested party.

Upon reexamination, the court was entitled to consider new testimony and to "render judgment thereon." The court's judgment might annul or correct the location and survey, and might cause the U.S. Surveyor General to correct and return a new survey and location. A six month period was allowed for appeal of a district court decree. The final approved survey and location was then returned to the U. S. Surveyor General, who transmitted it to the General Land Office, which issued the patent.

A subsequent Act of July 1, 1864 (13 Stat. 332) repealed the Act of June 14, 1860, but allowed all proceedings commenced under the former Act to proceed to a complete determination and decree.

The procedures of the Act of March 3, 1851 were followed in the Ruiz application for confirmation of the Rancho La Bolsa Chica. (Exh. 3.) A survey of the confirmed claim was then undertaken and published. (Exh. 4.) Since the motivating factor underlying the

1973 Agreement was a disputed boundary, it is important to note that Ruiz excepted to the results of this survey. He argued that the ocean boundary of the federal patent should have been drawn along the ocean beach, across the mouth of the southeasterly inlet shown on exhibit 4.[6] However, the court overruled his exceptions and held for the boundary shown on exhibit 5 of the survey, excluding the inlet from the Rancho and thereby leaving it as sovereign lands. [*Joaquin Ruiz, Appellee* ads. *the United*
[*5] *States, Appellants* — No. 205 "Bolsa *Chica" (1857 and 1864) (summarized in Hoffman's Reports (1975) Appen. p. 56); see also exh. 3, pp. 1-2.] The confirmatory patent was issued by President Grant on May 7, 1874. (Exh. 3.)[7]

b. *State Patent of the Bolsa Chica Tidelands.*

As to ungranted tidelands and ungranted submerged lands beneath inland waters, it has long been established that the lands below the ordinary high tide line were reserved to the original states by virtue of their sovereignty at the conclusion of the War of Independence. (*Knight v. United Land Association, supra*, 142 U.S. 161, 183.) States subsequently joining the Union also obtained title to such lands on the basis of the "equal footing" doctrine. [*Pollard's Lessee v. Hagan* (1845) 44 U.S. (3 How.) 210 [11 L.Ed. 565]; II Shalowitz, Shore and Sea Boundaries (1964) p. 427.] Therefore, when California became a state, it assumed soverign ownership over all lands held in trust for it by the federal government, namely all ungranted tide and submerged lands. (*Knight, supra*, 142 U.S. 161, 186.)

Shortly after statehood, California enacted statutes permitting the sale of tidelands. (See statutes cited in *People v. California Fish Co.* (1913) 166 Cal. 576.)

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[6] Bolsa Bay was at one time a small inlet or estuary having its own entrance to the Pacific Ocean. (Exh. 1, p. 319.)

[7] Many cases have held that where the procedure of the Act of March 3, 1851, *supra*, has been followed and a patent issued, such a federal patent is conclusive on this question. (See, e.g. *Knight v. United Land Association* (1891) 142 U.S. 161, 184 [35 L.Ed. 974, 12 S.Ct. 258]; *Beard v. Federy* (1865) 70 U.S. (3 Wall.) 478, 491 [18 L.Ed. 88]; *U.S. v. Coronado Beach Company* (1921) 255 U.S. 472, 486-488 [65 L.Ed. 736, 41 S.Ct. 378].)

Pursuant to these statutes, Horace M. Dobbins applied for a tideland patent to the southeasterly "inlet" area excluded from the federal patent of Rancho La Bolsa Chica. In 1899, pursuant to Tide Land Location No. 195, the State issued a tideland patent to Dobbins respecting that southeast "inlet". (Exh. 9; and see exh. 1, p. 284.) The lands described in the patent were subsequently conveyed to the Bolsa Land Company, then owner of the surrounding Rancho La Bolsa Chica.[8] The tideland patent recited an acreage of 528.82 acres. (Exh. 9, p. 5.)[9] The tideland patent area included islands surrounded by tidal channels (143.42 acres) and submerged lands (63 acres). (Exh. 14, pp. 5-6.)[10]

2. Bolsa Chica Development.

Following the issuance of the state patent, the Bolsa Land Company began work to reclaim most of the area
[*6] from tidal flows. In 1899, the Company built a *dam to block all seawater and to retain fresh water flowing into the low-lying portions of the tidelands. (Exh. 1, p. 265; exh. 11, pp. 23-25.) Only a small lagoon was left open to seawater.

In *Bolsa Land Co.* v. *Burdick* (1907) 151 Cal. 254, 259 it was noted, "[d]irect communication with the ocean was thus cut off, the water became inland waters not subject to the tides, and were and are wholly enclosed by the lands claimed by plaintiffs under their patents and deeds." In addition the State Lands Commission (which had not been a party to the *Bolsa* case) noted in 1973

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[8] A second State tideland patent is peripherally involved by ABC's action. This is the patent issued to R. J. Northam in 1903 pursuant to Tide Land Location No. 221. (Exh. 10.) This patent area is now a major portion of the Huntington Harbour area of Huntington Beach, which area was the object of an earlier tideland settlement and exchange with the State pursuant to section 6307 of the Public Resources Code. As only the southerly tip of this tideland patent area is involved, it will not be further considered. The validity of the Huntington Harbour agreement, as well as many others, may be affected by this case.

[9] The acreage was later measured at 526.4 by the State's resurvey prepared for the Agreement. (Exh. 14, p. 6.)

[10] The patent was issued pursuant to Political Code section 3340 (1872). Neither the statute nor the patents suggested any intent to improve navigation. In fact, the patents were made for general and unspecified uses. (*People v. California Fish Co., supra*, 166 Cal. 576.)

that, "[t]he dam caused the [ocean] inlet mouth to close by silting." (Exh. 1, p. 320.) Since the inlet mouth had sanded shut, a drainage access ditch was dug to the northwesterly inlet, Anaheim Bay. (Exh. 11, p. 25.)

3. Reasons for Settling the Dispute by Agreement Rather than Litigation.

The dispute between the State and Signal arose because Signal, successor in interest to both the federal rancho and state tideland patents, planned extensive development of the area. Resolving the dispute was an extremely complex project, exacerbated by several factors.

Signal asserted that the rancho grant conveyed all right, title and interest to the entire Bolsa Chica area to private ownership. To the extent that any rights in tide and submerged lands remained, Signal claimed they were held by Signal free of the public trust for commerce, navigation and fisheries. The State contended that the federal La Bolsa Chica Rancho patent did not convey title to the "inlet" shown on the plat of the Rancho (Exh. 4). The State contended that the state tideland patent conveyed title to the tidelands but that they remained subject to a public trust easement for commerce, navigation and fisheries. Moreover, the State maintained that those lands within the state tideland patent which were submerged lands in 1899 were not conveyed by the tideland patent and remained in the State's fee ownership. (Exh. 1, pp. 19-20.)

The 1861 Hancock survey on which the rancho patent was based did not close properly. (Exh. 11, p. 39.) The survey markers and critical monuments had disappeared over the years. (Exh. 11, pp. 35, 40.) No precise relocation of the boundary had been made since the 1860's. (Exh. 1, p. 320.) In fact, no fixed-line boundary had ever been made. The Hancock survey line was intended to be an approximation of the intended boundary: the line of ordinary high tide. (Exh. 11, pp. 37-39.) This natural boundary subsequently fluctuated due to natural and man-made changes. (Exh. 11, p. 48-49.)

Similar problems existed with the boundary location of the state tideland patent. No contemporary map of the ordinary low tide line (the submerged land

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[*28] *McQuillan, Municipal Corporations (3d ed. 1968) § 48.17 at pages 119-120.) With respect to State lands, the Legislature has delegated the power to compromise or settle claims to the State Lands Commission; upon approval by the Governor, such agreements becoming binding on the State. (§ 6107.)

C. The State has Specific Authority to Extinguish the Public Trust Under Certain Circumstances.

ABC claims that the State did not effectively terminate the public trust in Bolsa Chica.

It must first be noted that the State did not terminate the public trust within all 1,700 acres, as claimed. The State first determined in the Agreement that 1,444.52 acres of the Bolsa Chica area were rancho lands *not* subject to the State's tide and submerged land claims. It then conducted a trade of certain of those lands so as to acquire clear fee title to a 300 acre parcel, plus 27.5 acres of Highway lands. The land outside of these areas, approximately 1,700 acres, was declared free of the public trust, including 230 acres on which the State was given a 14 year lease, to which it could acquire fee title upon construction of an ocean entrance.

Within the area declared free of the public trust were 1,251.95 acres of rancho lands as to which such a declaration was only confirmatory, as no public trust existed over rancho lands.

Within the area declared free of the trust also lay 412.56 acres of former tidelands and 17.93 acres of former submerged lands. As to the tide and submerged lands as well, ABC fails in its claim that the action of the State was ineffective to terminate the trust.

From *City of Long Beach* v. *Mansell, supra,* 3 Cal. 3d 462, 485, back to *Eldridge* v. *Cowell* (1854) 4 Cal. 80, 87, the right of the State to convey soverign tide and submerged lands free of the trust for commerce, navigation

and fisheries has been established. *Eldridge* v. *Cowell*, *supra*, was a case involving the sale of water lots in San Francisco. It stated that:

> "The right of the State to do this has been established by repeated decisions. She holds the complete sovereignty over her navigable bays and rivers, and although her ownership is, by the law of nations, and the common and civil law, attributed to her for the purpose of preserving the public easement, or right of navigation, there is nothing to prevent the exercise of her power in certain cases to destroy the easement, in order to subserve the general good, which, when done, subjects the land to private proprietorship." (*Id.* at 87.)

* * *

[*30] *may find and determine that such lands are no longer useful for trust purposes and free them from the trust. When tidelands have been so freed from the trust — and if they are not subject to the constitutional prohibition forbidding alienation — they may be irrevocably conveyed into absolute private ownership."

Likewise, in *County of Orange* v. *Heim*, *supra*, 30 Cal. App. 3d 694, 722-723, a case reviewing another boundary settlement and exchange agreement entered into by the State Lands Commission (the "SLC"), the court inquired into whether or not the action of the SLC in freeing certain tidelands from the public trust and conveying them away would substantially impair "the public interest in the lands and waters remaining," or impair the "power of succeeding legislatures to protect, improve and develop the public interest in commerce, navigation and fisheries." The court held that the exchange proposed was:

> "[p]art of a program of harbor development in furtherance of a permissible trust use and would, as found by the SLC, result in a public benefit. Under these circumstances we do not think the 1967 action of the SLC can be said to be invalid under the impairment doctrine." (*Id.* at 723.)[28]

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[28] The agreement in *Heim* was held invalid on other grounds.

In 1973 the State entered into the Bolsa Chica Agreement. This was done only after extensive study, reports and planning regarding use of the Bolsa Chica area. It determined that with the present limited tidal flows 300 acres could be converted into a salt marsh area. It determined that construction of an open ocean channel would make useable an additional 230 acres, allowing the creation of a marina in the area. It took a rent-free 14 year lease on the 230 acres, which would become fee title if the channel were constructed within that time.[29]

By the exchange of lands with Signal, the lands involved were consolidated so as to make this trust use of the land feasible. The State, pursuant to Public Resources Code section 6301, then declared the balance of the area (including the 230 acre lease area) free of the public trust for commerce, navigation and fisheries. This declaration covered the 1,251.95 acres of rancho lands, which were already independent of the public trust, as well as the 412.56 acres of former tidelands and 17.93 acres of claimed former submerged lands.

The long and sinuous tideland fingers, over which the State held only the claim of public trust rights, plus a small area of former submerged lands claimed in fee, thus was exchanged for a consolidated parcel of 300 acres of fee ownership, with an option in the State to increase fee ownership to 530 acres.

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[29] If the 230 acres comes into State ownership, it will be classified as tide and submerged lands subject to the trust, pursuant to Public Resources Code § 6307. This 230 acre parcel includes 147.03 acres of former tidelands and all 17.93 acres of former submerged lands. (Exh. 14, p. 5.)

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[*52] *ABC contends that the 1973 Agreement violates the intent of this section by removing the public trust.[30] As has been previously shown in this brief, the public trust was properly terminated in Bolsa Chica. Article X, section 4 does not prohibit termination of the common law trust where it is otherwise proper. (*Atwood* v. *Hammond, supra,* 4 Cal. 2d 31, 41.)

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[30] ABC again miscites the amount of acreage by including rancho lands which were not subject to the trust. (AOB. pp. 51-52.)

ABC also contends that the "three-pronged test" applies to removal of lands from the coverage of article X, section 4. In this respect, we must first refer to Part IV D, *supra*, in which we note that the "three-pronged test" applies only to the grant or sale of ungranted tide and submerged lands.

The *Mansell* case clearly shows that the "three-pronged test" is to be applied only in regard to article XV, section 3 (now art. X, § 3). It does not apply to article XV, section 2 (now art. X, § 4). (*Mansell, supra*, 3 Cal. 3d 462, 478, 482, 484-485.) This fact was made quite clear by *County of Orange* v. *Heim, supra*, 30 Cal. App. 3d 694, 709, fn. 14. And at page 710, the court stated:

> "... *Mansell* specifically recognized the flat prohibition in article XV, *section 3 of the California Constitution against alienation of tidelands within two miles of an incorporated city* (3 Cal. 3d at p. 482) but, nevertheless, delineated three situations in which the prohibition did not apply: (1) the settlement of a genuine boundary dispute (3 Cal. 3d at pp. 480-481); (2) a situation in which the circumstances are such as to create an equitable estoppel (3 Cal. 3d at pp. 486-501); and (3) under the particular, limited circumstances there involved, a small, beneficial land exchange. Neither a boundary dispute nor equitable estoppel are involved in the case at bench. Respondents contend and the trial court found, however, the land exchange agreement here in question to be constitutional under the principles explicated in *Mansell* relating to the land exchange in that case." (Emphasis added.)

Mansell itself stated:

> "To reiterate, we conclude that when *lands within two miles of an incorporated city or town* which were subject to the ebb and flow of the tide at the date of the adoption of the Constitution — and which therefore are 'tidelands' within the meaning of *article XV, section 3*— (1) have been found and determined by the Legislature to be valueless for trust purposes and are freed from the public trust (see fn. 17, *ante*) and (2) have been or are to be reclaimed pursuant to and in

the course of a highly beneficial public program of harbor development, such lands — if they constitute a relatively small parcel of the total acreage involved — thereupon cease to be 'tidelands' within the meaning of the constitutional provision and are subject to alienation into absolute private ownership." (3 Cal. 3d 462, 485-486; emphasis added.)

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STATE OF CALIFORNIA
Department of Justice
George Deukmejian
(PRONOUNCED DUKE-MAY-GIN)
Attorney General

October 20, 1982

THE HONORABLE MARGARET J. MORRIS, Presiding Justice,
and Associate Justices of the Court of Appeal
Fourth Appellate District
Division II, Room 640
303 West Third Street
San Bernardino, CA 92401

Re: State Respondents' Supplemental Brief
Amigos de Bolsa Chica, Inc. v. Signal Properties, Inc., 4 Civ. Nos. 23146 and 23778

Dear Presiding Justice Morris and Associate Justices:

The recent Supreme Court decision in *City of Los Angeles v. Venice Peninsula Properties* (1982) 31 Cal.3d 288 was raised by appellants for the first time at oral argument. This Court granted respondents permission to file a supplemental brief discussing the effect of the *Venice Properties* decision on this case.

Venice Properties held that tidelands within a Mexican rancho are subject to the public trust easement for commerce, navigation, and fisheries. 31 Cal.3d at 302. However, the *Venice Properties* opinion has no effect on the Bolsa Chica case for two reasons. First, any third party inquiry into the effect of this recent decision on the State's 1973 Settlement Agreement must be foreclosed by the statute of limitations. Pub. Res. Code, § 6341. To hold otherwise would allow third parties to circumvent the statute of limitations and reduce it to a nullity. Second, apart from the statute of limitations, the State was a party to the *Venice Properties* case at the time the 1973 Agreement was being negotiated. Being well aware of its position in the *Venice Properties* case, the State was careful to identify and consider the tidelands within

the Rancho La Bolsa Chica ("Rancho") as part of the 1973 Settlement Agreement.

At the outset it must be observed that although the State *did* consider the tidelands within the Rancho, this is precisely the kind of issue which must be foreclosed by the statute of limitations. In essence, appellants assert that because of the recent decision in *Venice Properties*, [*2] *the State should have claimed additional acreage as tidelands.

However, even prior to the Supreme Court's *Venice Properties* decision, appellants already had asserted that the State had underestimated its acreage claims, and that the State Lands Commission therefore had erred in finding that there was equal value.[1] As respondents have set forth in their brief, the question of acreage and value was resolved by proper findings made by the agency entitled to make them. As is the case with other administrative agencies, these findings can be challenged, but only in a timely fashion; they cannot be challenged forever.

Nor should an exception to the statute of limitations be created for new court decisions, at least insofar as untimely challenges brought by third parties. The State is authorized to settle and compromise its claims and disputes. Gov. Code, § 948; *Silver v. Watson* (1972) 26 Cal. App.3d 905; *Whitson v. City of Long Beach* (1962) 200 Cal.App.2d 486, 505-506; 17 McQuillin, *Municipal Corporations* (3d ed. 1968) § 48.17 at pp. 119-120. It is specifi-

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[1] Indeed, at oral argument, counsel for appellants claimed that she could produce "maps" which would demonstrate that the State should have claimed additional acreage. Respondents deny this. However, this assertion begs the question. Appellants' complaint states that they "own homes adjacent to . . . Bolsa Chica" and that they have used the Bolsa Chica area for years. Clerk's Transcript I, p. 53. If appellants indeed possessed such maps, they should have produced them during the three-year period (from 1970 to 1973) when the State was investigating its acreage claims and holding public hearings. Exh. 1, pp. 7-8, 320-321, 323. After the Agreement was executed in 1973, appellants still failed to produce such maps. The statute of limitations did not run until 1977 in this case — four years after execution of the 1973 Agreement. Pub. Res. Code, § 6341. Appellants had a long period of time in which to produce such maps, if they existed, but failed to do so. Such assertions only demonstrate the necessity for a statute of limitations in order to lend finality to the State's boundary line and exchange agreements.

cally authorized to resolve disputes over public trust
[*3] boundaries. *Pub. Res. Code, §§ 6307, 6336, 6357. As demonstrated at length in our brief, such resolution will be impossible if subject to third party attack for all time. Under these circumstances, third parties should not be permitted to second-guess the State's administration of its public trust responsibilities after the statute has run. To hold otherwise would allow members of the public to effectively usurp the State's authority to administer the trust.

Even if the effect of the statute of limitations were disregarded, *Venice Properties* would in no way alter the posture of the present case, because the tidelands within the Bolsa Chica Rancho were in fact thoroughly considered and taken into account in the State's negotiation and consummation of the Bolsa Chica Agreement.[2] At the time of that negotiation, the State was involved as a named defendant in *Venice Properties,* as it had been since 1965, and therefore was fully aware of the issues involved therein. Accordingly, the State conducted an extensive investigation of all its claims of rights to and interests in the Bolsa Chica area, including an investigation of the tidelands within the Rancho.

In order to establish the historical character of the Bolsa Chica lands, the engineering firm of Moffatt & Nichol was engaged to perform an independent investigation of all the historic tidelands therein. Exh. 11; Exh. 1, pp. 22, 320-321.[3] The Moffatt & Nichol report (Exh. 11) included a thorough delineation of all categories of lands within Bolsa Chica, including tidelands

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[2] The State's identification of and consideration of tidelands within the Rancho is well documented in the record, as will be set forth at length in the discussion that follows. State respondents' brief (p. 28) erroneously states that the Rancho lands were not subject to the public trust. As can be seen from the record, this statement in the brief was made in error.

[3] Unless otherwise stated, all Exhibits referred to are those judicially noticed in connection with State Respondents' Demurrer to First Amended Complaint, and now before this Court.

and submerged lands both within and without the
[*4] Rancho. This identification *of tidelands and submerged lands is broken down into categories. Exh. 11, p. 87.

In addition, Moffatt & Nichol portrayed the various land classifications that had been made on a multi-colored map which is included within State Respondents' Brief as Exhibit A (a reproduction of Exhibit 12). The map graphically depicts the tidelands within the Rancho in yellow.

That the State identified the tidelands within the Rancho is established beyond doubt by the Moffatt & Nichol map, reproduced as Exhibit A. In addition, the State's consideration of tidelands within the Rancho is further substantiated by the Agreement and its exhibits. As the State Lands Commission Calendar Item recites: "The area affected by the State claims also involves a *determination* of the extent of lands included *within the Rancho* . . . ." Exh. 1, p. 320 (emphasis added). Similarly, the Agreement itself states that a portion of lands in Bolsa Chica were tidelands, "and that certain limited portions thereof *were included in the* Bolsa Chica *Rancho* Grant. . . ." Exh. 1, p. 22 (emphasis added).

From the foregoing, it is abundantly clear that the State did identify and consider the tidelands within the Rancho as part of the Bolsa Chica Settlement Agreement. Moreover, the State included in its tideland claims (disputed by Signal) all of the yellow areas identified on Exhibit A as within the Rancho with the sole exception of certain areas (portions of sloughs) which had been "cut off"[4] by the surveys of the Rancho and the

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[4] An example of sloughs which were cut off may be seen upon reference to the language of State Tideland Patent 195 (Exh. 9, page 1, last ten lines, through page 2, first ten lines). That language contains several references to cutting off sloughs as the surveyor proceeded along the northeasterly boundary of Bolsa Bay. It may be compared to Courses 47 through 62 depicted upon the federal Plat of Rancho La Bolsa Chica (Exh. 4). A review of this same area upon the Exhibit A Map discloses that the sloughs that were cut off were lesser tributaries or "fingers" that wound northerly into the Rancho. These "fingers" are to be distinguished from the main body of water in the area, Bolsa Bay.

[*5] State *tideland patent.[5] These sloughs were cut off by specific calls in the surveys establishing the Rancho and tideland patent boundaries. Exh. 11, p. 37; Exh. 1, pp. 36-37. These "cut offs" were made pursuant to established surveying practices.[6]

As is noted in *Clark on Surveying and Boundaries* (John S. Grimes, 4th ed. 1976) §§ 257-274, pp. 308-338, there are many rules that apply to the surveying of meander lines around tidewater monuments. This treatise recognizes the practical rule that streams and sloughs cannot be meandered indefinitely; when their size diminishes to non-navigable proportions they are simply cut off by running the meander line across the slough or stream. *Clark, supra,* § 264.

This is the present rule regarding the cutting off of minor sloughs and tributaries. Other cases involving cutting off streams or sloughs consider statutory grants *(People v. Morrill* (1864) 26 Cal. 336, 355), legislative grants *(City of Oakland v. Oakland Water Front Co.*
[*6] (1897) *118 Cal. 160, 175), and pueblo grants *(Knight v. United States Land Assn.* (1891) 142 U.S. 161, 207 [Field, J., concurring]). The conclusion we may draw is that the State was correct in including within the Rancho all of the most minor slough and stream areas

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[5] See 1973 Agreement, Exh. 1, p. 20 (the "landward boundary of said inlets is the ordinary high water mark and the locations where the sloughs and tributaries are crossed by the survey line shown on said plat"); see also State Lands Commission Calendar Item, Exh. 1, p. 320 ("The area affected by the State claims also involves a determination of the extent of lands included within the Rancho inasmuch as the Rancho boundary is the ordinary high water mark of Bolsa Bay (with certain exceptions where sloughs and tributaries were included within the Rancho) and such a boundary moves in location with natural changes.").

[6] In surveying the Bolsa Chica area, the surveys utilized meander lines to approximate the contours of the tidelands. Meander lines are straight lines drawn between fixed points, used to define the sinuosities of a body of water to ascertain the acreage. *People v. Ward Redwood Co.* (1964) 225 Cal.App.2d 385, 389. Further, in situations involving meander lines approximating water lines, courts have approved such approximations as long as they are close enough to be a fair approximation. See *e.g., Muchenberger v. City of Santa Monica* (1929) 206 Cal. 635.

above the point where the meander line of Bolsa Bay cut them off.

Bolsa Land Co. v. Burdick (1907) 151 Cal. 254 is instructive on the question of cutting off minor sloughs. In that case the previous owner of the same property here in question applied for an injunction against various members of the public who continually came onto the Bolsa Chica holdings on foot and by boats (which they maneuvered down the "Freeman River" drainage ditch) for the purpose of hunting waterfowl. The court noted that "the meander lines of the United States patent crossed this so-called Freeman River at its mouth or junction with a tributary slough of Bolsa Bay. The whole length, therefore, of this Freeman River or ditch was conveyed into private ownership by this patent, which thus contains a distinct negation of the claim of navigability."[7] *Bolsa Land Co. v. Burdick, supra,* at 260. The court held an injunction to be appropriate.[8]

[*7] *Indeed, the *Bolsa Land Co.* opinion also suggests that the cut-off sloughs within the Rancho were not tidal at all. The opinion states that the lands embraced by the State's Tideland Patent were "affected by the flow of the tides." *Id.* at 258. However, the Court went on to observe as follows:

"It further appeared, without contradiction, that from the *upper reaches of land, fresh water* drained down

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[7] Following the *Bolsa Land Co.* case, the Supreme Court in *Forestier v. Johnson* stated: "[t]he decision in *Bolsa Land Co. v. Burdick* [citations], and the comments of the court regarding the power of the state to sell tidelands, are based on the conclusion stated in the opinion that the waters there involved were not navigable." *Forestier v. Johnson* (1912) 164 Cal. 24, 38. It must be remembered that the State could not ignore these statements of our Supreme Court in negotiating the Settlement Agreement.

[8] Moreover, a parallel may be drawn to the later discussion in the *Bolsa Land Co.* case regarding the State's sale of swamp and overflowed lands adjacent to the shores of the ocean and its navigable bays. The Court found that reclamation of the lands required the erection of dams across very minor sloughs, "thus cutting them off from their original ocean or bay connections." *Id.* at 261. The Court held that the propriety of such actions was a matter that rested wholly in the judgment of the State. *Id.*

into these sloughs and into Bolsas Bay . . . ." *Bolsa Land Co. v. Burdick, supra,* at 258 (emphasis added).

This language by the Court, suggesting that the upper reaches of the sloughs were fresh water and nontidal, substantiates the appropriateness of cutting off these sloughs.

CONCLUSION

The statute of limitations remains a bar to the appellants' complaint as much now as it was before the *Venice Properties* case was decided. The State did consider the location of all possible tideland areas in the Bolsa Chica area, both within the Rancho La Bolsa Chica and outside the Rancho. The only tideland areas that were considered not subject to the public trust easement were minor sloughs or streams that were cut off by the Rancho plat, the Rancho patent, and the tideland patent. These areas were the tail ends of the very minor sloughs which were cut off in light of case law and surveying practice. All of the Bolsa Chica area, with the exception of these cutoffs, was valued by the State.

The factual situation in Bolsa Chica as respects Rancho tidelands stands in direct contrast to that in the *Venice Properties* case. In *Venice Properties*, the main body of water at issue (the lagoon) was itself located within the Rancho. In Bolsa Chica, the main body of water (Bolsa Bay) was located outside the Rancho, within the State's tideland patent. The *Venice Properties* case did not deal with minor fingerling sloughs and drainage channels draining into the main body of water which is located outside the Rancho.

In any event, the State had investigated all of the various categories of lands in the area, and there was
[*8] *more than ample consideration to support the Exchange Agreement. The State appraisal proceeded in accordance with the following assumptions:

1. Although the State had only an easement for commerce, navigation and fishing in most of the lands it was giving up, it valued those lands as if the State held a fee interest.

2. No deduction from value was made by reason of the poor configuration of the lands the State was giving up.

3. No increment to the value of lands the State was receiving was added by reason of the more useful shape of said lands ("plottage").

4. No value was assigned the 14 year, 230 acre lease-option which the State received. (Exh. 14, p. 2.)

Despite these factors the appraisal revealed a $1.8 million balance in favor of the State in said land exchange. (*Id.* at 14, 17.)

In sum, this was a fair exchange, yielding great benefit to the State. It considered all possible State interests within the area. It does not violate any portion of the Court's holding in *Venice Properties*. It should be allowed to stand. In any event, any inquiry into the *Venice Properties* decision must be foreclosed by the statute of limitations. To hold that third parties can rely on recent court decisions to circumvent the statute of limitations would reduce the statute to a nullity, and
[*9] eliminate the *finality which is essential to the State's ability to resolve complex tideland boundary disputes.

Respectfully submitted,

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